

reasons given by a judge for arriving at conclusions of fact is not 'law' and does not constitute judicial precedent.

To return to the evidence in this case, whichever version of the accused takes, the blunt fact remains that for the sake of a monetary payment he took the packet in question, concealed it on his person, and moved off to deliver it to its designated consignee. 'Carrying, sending, and delivering,' is included in 'trafficking' under s 2 of the Act.

As to knowledge, heroin was uppermost in the accused's mind at the time. He was a self-confessed drug addict. He got the packet from a person he knew to be a drug supplier and he was going to give it to a person who was to sell him drugs. He knew the packet contained something 'illicit'.

Before it was put in, the court interpreter explained the cautioned statement to the accused in Cantonese and the accused confirmed it was what he told the recording officer. It is true that he said then that he did not know what was in the packet. In court too he disclaimed knowledge of the contents. His denial was consistent. But was it credible?

The accused contradicted himself on who gave him the package (three Malays in the cautioned statement; Tan Boon Hock in his evidence). And on how much he was paid (\$40 in his evidence-in-chief with a \$1 to be used as a password and \$100 in his cross-examination). These are serious discrepancies.

Then there is the question of the note to Tan Boon Hock. Tan Boon Hock had been summoned and was in the court precincts but he was not called by the accused. The accused has no duty to call any witnesses and in this respect I do not consider a drug case to be any different to a normal criminal case even where the presumptions apply. The fact that the note had to be written at all does not add to the accused's credibility. Where it leaves the court is that the accused took this packet for \$100 to convey it to Ah Keong.

Has he displaced the presumption that he knew that it contained 'heroin'? The fact that he knew both Tan and Ah Keong to be drug suppliers, was himself a drug addict, concealed the packet in his trousers and ran away from the police, to my mind points only to one conclusion. The accused knew he was carrying heroin. At the risk of repetition but to make myself absolutely clear, I do not think that the accused's not knowing that 83.62g out of the 235.60g of the contents of the packet was pure heroin is a defence, since I hold he knew the nature of the drug he was carrying.

The only factor which may be urged in the accused's favour in this case is the fact of he being a drug addict and suffering from withdrawal symptoms at the time he was

A in Tan's power and had to do what he was told. But that factor can only be a mitigating circumstance when the fate of the accused is ultimately considered because in my view he was fully conscious of what he was doing, and he knew he was doing wrong.

B Consequently I convict him of the offence of which he is charged and would invite counsel to make any observations considered appropriate before I pass on to sentence.

C (After hearing defence counsel on observations appropriate for consideration by the Pardons Board, the court made orders for retention of the exhibits and stay of execution pending appeal. The accused was then sentenced to death.)

Accused convicted.

Solicitors: *Yusuf, Lee, Pathma & Marbeck.*

Reported by *Mathavan Devadas*

E **Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor**

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 22-980
OF 1987
RICHARD TALALLA JC
F 25 FEBRUARY 1990

G *Land Law — Sale by public auction — Whether rights of chargor cease before conclusion of sale — Failure of purchaser to make payment of balance within stipulated time — Whether purchaser entitled to extension of time to make payment under order of court for sale — National Land Code 1965, ss 256, 257(1), (2) & 258(1)(a)*

H The first plaintiff ('Siland') was at all material times the owner of a piece of land. This land was charged to the second defendant ('Eu Finance') as security for a loan. Siland defaulted, whereupon Eu Finance applied for an order for sale of the land by public auction. The sale was subject to certain special conditions of sale. The first defendant ('Frozen Food') was duly pronounced the purchaser and a deposit of 25% of the purchase price was paid and a memorandum of contract was executed between the auctioneer and Frozen Food. Under cl 7 of the special conditions, Frozen Food was obliged to pay the balance of the purchase price into court within 30 days of the date of sale, ie 25 January 1987, and time was the essence of the contract. Frozen Food failed to do so. In July 1987, they obtained an order of court extending the time to pay the balance of the purchase price. However, Siland was not made a party to the proceedings. Siland then successfully applied to intervene in the proceedings and the order extending time was set aside. Notwithstanding the setting aside, Frozen Food paid the balance of the purchase price into court. On 29 September 1988, the senior assistant registrar issued a certificate of sale and the land was transferred to and registered in the name of Frozen Food.

Siland then sought a declaration that (1) Frozen Food was not entitled to an extension of time to pay the balance purchase price; (2) the deposit be forfeited in Siland's favour; (3) the purported sale to Frozen Food be rescinded; (4) the certificate of sale be annulled; (5) the registration of Frozen Food's title to the land be cancelled; (6) the issue document of title be returned to the registrar; and (7) the property be put up for sale by the court again.

Held, allowing the first plaintiff's application:

(1) Notwithstanding the order of sale, the chargor has rights in respect of land which continue until the sale is concluded. Under s 266(1) of the National Land Code 1965, a chargor may at any time before the conclusion of the sale pay up all moneys due under the charge and all expenses whereupon the order for sale shall cease to have effect. As it is the chargor's land, it is only right that if he pays the debt in full together with all expenses before the concluded sale, the order for sale should cease to have effect and the chargor should have his land back.

(2) There was no provision in the order for sale, the Johore conditions of sale, the special conditions or the memorandum of contract empowering the court on the application of the buyer of the land to extend time for payment of the balance purchase price. The extension of time was granted without reference to the chargor and in abrogation of the chargor's rights, thus rendering the chargor open to liability to pay additional interest on the loan for the extended period. It also gave preference to the buyer who had defaulted under the contract and, subject to ten days' notice, would have had his deposit forfeited, and the property resold. As such Frozen Food is not entitled to the extension of time.

[*Editorial Note*: The first defendant has appealed to the Supreme Court vide Civil Appeal No 02-149 of 1990.]

Case referred to

1 *Malayan United Finance Bhd v Liew Yet Lan* [1990] 1 MLJ 317 (distd)

Legislation referred to

National Land Code 1965 ss 256, 257(1), (2), 258(1)(a)

N Jegatheeson (Gunasegaran with him) for the plaintiffs.
Arthur Lee (SC Yap with him) for the first defendant.
Sophia Chew (Ms) for the second defendant.

Cur Adv Vult

Richard Talalla JC: In this action the first plaintiff, Siland Sdn Bhd ('Siland'), was at all material times the owner of a piece of land in the mukim of Plentong in the district of Johore Bahru ('the land'). Siland charged the land to the second defendant, Eu Finance Bhd ('Eu Finance'), as security for a loan granted by Eu Finance to Siland. Siland defaulted under the terms of the charge whereupon there accrued to Eu Finance a right to have the land sold and the loan realized out of the proceeds of sale.

It is trite that when a lender wishes to sell the land of a borrower in order to recover a debt, as in the present case, the lender cannot sell the land as and how the lender pleases. The law requires the sale of the land to be under

A the supervision of the court. This is in order to ensure that the sale is carried out in justice and fairness to all persons concerned which persons include not only the chargee but also the chargor.

The procedure for the exercise by the court of its supervisory powers over the sale of land held under registry title, as the land in this case was, is contained in ss 256 to 259 of the National Land Code 1965. Section 256 provides for an order for sale of land to be made on application by the chargee. Under s 257(1), the order for sale shall provide for the sale to be by public auction. Subsection (2) of that section enables the court to include in the order for sale such other directions with respect to the sale as the court may think fit.

In order to facilitate the imposition by the court of the terms and conditions of sale, certain general conditions of sale were set out. These general conditions are known as the Johore Conditions of Sale. They provide, inter alia, that in case of conflict or repugnancy between those conditions and any special conditions imposed on any sale, the special conditions shall prevail; and the Johore Conditions shall be deemed to be modified so far only as is necessary to give full effect to such special condition. See cl 23.

In Originating Summons No 180 of 1985, Eu Finance applied to this court for an order for sale of the land. Siland entered an appearance to the summons. Pursuant thereto, an order for sale of the land was made and the second plaintiff, Mohd Kepol bin Bidin ('Kepol'), now deceased, a licensed auctioneer was appointed by the court to carry out the sale.

The sale was by public auction and conducted subject to a proclamation of sale and certain special conditions of sale ('special conditions') both of which were printed and duly published. The first defendant, M & J Frozen Food Sdn Bhd ('Frozen Food'), was the successful bidder at the auction and duly pronounced the purchaser at a price of \$196,000. In accordance with cl 6 of the special conditions, Frozen Food paid a deposit of 25% of the purchase price and a memorandum of contract was executed between Kepol and Frozen Food. Under cl 7 of the special conditions, Frozen Food was obliged to pay the balance of the purchase money into court to the credit of the proceedings within 30 days of the date of sale, the date of sale being 25 January 1987, and in this respect time was of the essence of the contract. Frozen Food failed to do so.

The special conditions did not provide for the consequence of such failure, nor did the memorandum of contract. Therefore recourse had to be had to the Johore Conditions of Sale which were expressly stated to apply. There it is stated, see cl 19, that if the purchaser shall fail to comply with these or the special conditions or the contract, the vendor shall be at liberty (after ten days'

written notice to the purchaser or his solicitor) to treat the deposit as forfeited, and, without tendering an assurance, to resell the property. It is not known whether such written notice was given to Frozen Food.

The record in Originating Summons No 180 of 1985 discloses that a letter dated 18 February 1987 was written to our senior assistant registrar wherein an extension of two months from 25 February 1987 to pay the balance of the purchase price was sought. This letter was followed by another dated 8 May 1987 seeking a further extension of one month from 25 April 1987 in which to pay the balance. There appears to have been no answer to either letter.

On 15 July 1987, Frozen Food applied to this court by Originating Summons No 31-731 of 1987 whereunder it sought an order for an extension of time to pay the balance price. Thus they waived the right to have the ten days' written notice, assuming such notice was not given. The respondents in the originating summons were Eu Finance. The order for extension of time was made the same day. Siland was not made a party to the proceedings. However, Siland obviously had wind of it and on 8 October 1987, claiming to be an interested and aggrieved party, applied to intervene in the proceedings. The application was allowed and it was further ordered that the order of 15 July 1987 extending time be set aside.

Notwithstanding the setting aside of the order of 15 July, Frozen Food paid the balance of the purchase price of \$147,000 to the senior assistant registrar. This payment was incidentally one year after the expiry of the period stipulated in the special conditions for the payment of the balance of the purchase price.

On 29 September 1988, the learned senior assistant registrar issued a certificate of sale and the land was transferred and registered in the name of Frozen Food.

Siland now seeks relief to the end that it be declared that Frozen Food are not entitled to an extension of time to pay the balance purchase price, the deposit of \$49,000 be forfeited in their favour, the purported sale of the land to Frozen Food be rescinded, the certificate of sale be annulled, the registration of Frozen Food's title to the land be cancelled, the issue document of title be returned to our registrar and the property be put up for sale by the court once again.

It is submitted on behalf of Frozen Food that the moment the hammer was struck at the auction, the sale was complete and Siland's right to the land vanished and all Siland was entitled to thereafter was the residue, if any, of the money realized on the sale of the land. The decision of VC George J in *Johore Bahru High Court Originating Summons No 31- 745 of 1985 Malayan United Finance Bhd v Liew Yet Lan*¹ was relied on for support of the argu-

ment. A reading of that decision, with which I respectfully agree, does not appear to support Frozen Food's case at all. There his Lordship laid down that a defaulting chargor abdicated his right as registered owner of the land vis-a-vis selling it, in favour of the chargee. That is, to my mind, a far cry from saying that a chargor's right to the land, the right to residue of the balance purchase price excepted, vanishes as soon as the auctioneer brings down his hammer.

It seems to me that notwithstanding the order for sale the chargor has rights in respect of the land which continue until the sale is concluded. Pursuant to s 266(1) of the National Land Code 1965 he may at any time before the conclusion of the sale pay up all moneys due under the charge and all expenses incurred in connection with the order for sale whereupon the order for sale shall cease to have effect. This may well be one of the reasons why the registrar of the court is required to serve a copy of the order for sale on the chargor. See s 258(1)(a) of the Code. After all it is the chargor's land. It is therefore only right and in accordance with common sense that if he pays the debt in full together with all expenses before the concluded sale, the order for sale should cease to have effect and the chargor should have back his land.

Nowhere in the order for sale, the Johore Conditions of Sale, the special conditions or the memorandum of contract was there anything empowering the court, on the application of buyer of the land, to extend time for payment of the balance purchase price; it is quite the contrary. VC George J found so in the *Malayan United Finance* case¹ abovestated and likewise possibly did the learned judge who set aside the order extending time.

The extension of time was granted without reference to the chargor. It was granted in abrogation of the chargor's rights, thus rendering the chargor open to liability to pay additional interest on the loan, to wit, interest for the extended period allowed for completion of the sale. What is more, the extended time gave preference to the buyer who had defaulted under the contract and who by virtue of that default and the terms of the contract should, subject to the ten days' notice, have had his deposit forfeited whereafter the property should have been resold. Frozen Food obtained this without notice to Siland. It was soon put right when Siland intervened and put forward their case.

That being the case, it does not fall to me to declare that Frozen Food is not entitled to the extension of time. That is so much water as has passed beneath the bridge. As I see it, I must now make orders consequential to the order setting aside the order for extension of time. There is no appeal against that order.

Eu Finance had taken the same stand as and supported Frozen Food.

I accordingly adjudge as follows:

- (a) the deposit of \$49,000 be forfeited in favour of Siland;
- (b) the learned senior assistant registrar's certificate of sale be annulled;
- (c) the registration of the title to the land in the name of Frozen Food be cancelled and the issue document of title thereto be returned to the senior assistant registrar;
- (d) the land be resold;
- (e) there be liberty to apply;
- (f) the defendants do pay the first plaintiff's costs of the action to be taxed.

Application allowed.

Solicitors: *Guna & Co; Arthur Lee, Yap & Netto; KC Yap Kamaludin & Partners.*

Reported by *Yap Shao Sin*

Ley Boon Hee v Paling Construction Sdn Bhd

HIGH COURT (BORNEO) — SUIT NO KG 606 OF 1986
HAIDAR J
2 FEBRUARY 1990

Civil Procedure — Defence and counterclaim — Application for striking out — Failure of defendants to comply with court order — Whether plaintiff thereby prejudiced — Rules of the High Court 1980, O 24 r 16(1)

The plaintiff filed a summons-in-chambers under O 24 r 16(1) of the Rules of the High Court 1980 ('RHC') against the defendant for an order, inter alia, that the defence and counterclaim be struck out and judgment entered in favour of the plaintiff. The plaintiff contended that the defendant had failed to comply with the court order pursuant to summons for directions in that the defendant did not within 60 days serve on the plaintiff a list of documents and file an affidavit verifying such list and thus the plaintiff had been prejudiced. The defendant's counsel filed the list of documents and the affidavit verifying such list on 13 January 1990 (expiry of the 60 days being on 15 January 1989) but they could not be served on the plaintiff's advocates on 13 January 1990 itself, as it was a Saturday and the latter's office does not work on a Saturday. It remained unserved at the date of the hearing of the present summons on 15 January 1990.

Held, making an 'unless' order:

(1) Order 24 r 16(1) of the RHC clearly gives power to the court in such an application to order that the defence be struck out and judgment be entered accordingly unless the party complies with the rule or order for discovery by a stated hour of a stated day. However, such power is a discretionary one and it has to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with.

A (2) The issue of delay per se does not by itself necessarily mean that the court should grant the order prayed for in this summons by the plaintiff merely on the ground of non-compliance with the procedural steps laid down under RHC as the merits of the case is a material consideration.

B (3) The proper course is for the plaintiff to apply for an 'unless' order which the defendant is asking for in this case from the court.

(4) As the defendant had filed the list of documents and the affidavit verifying the list of documents, though not served on the plaintiff yet, the object of the plaintiff has in fact been achieved because the summons has produced what they wanted, viz that the due process of the action should go forward.

C [Editorial Note: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-91 of 1990.]

Cases referred to

- 1 *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803 (refd)
- 2 *Husband's of Marchwood Ltd v Drummon Walker Developments Ltd* [1975] 2 All ER 30 (fold)
- D 3 *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 (refd)

Legislation referred to

Rules of the High Court 1980 O 24 r 16(1)

E *Cheng Ling (Miss)* for the plaintiff.
HC Sim for the defendant.

Cur Adv Vult

Haidar J: Ley Boon Hee ('LBH'), the plaintiff, filed a summons-in-chambers dated 20 July 1989 under O 24 r 16(1) of the Rules of the High Court 1980 ('RHC') against the defendant, Paling Construction Sdn Bhd ('PCSB'), for an order that:

- (i) the defence and counterclaim dated 9 January 1987 be struck out;
- (ii) judgment be entered in favour of LBH for the sum of \$461,957.37;
- G (iii) damages to be assessed by the Registrar of the High Court; and
- (iv) costs to be taxed including the costs of and incidental to the summons (encl 47).

H The grounds of the summons are:

- (a) PCSB has failed to comply with item 2 of the court order dated 3 October 1988, that is, it did not comply within sixty (60) days from the date of service of the court order serve on LBH a list of documents and file an affidavit verifying such list;
- I (b) the delay is inordinate, inexcusable, and/or intentional and contumelious; and
- (c) LBH has been irreparably prejudiced by the failure of PCSB to comply with the said item 2 of the court order, which cannot be compensated by costs.

It is supported by the affidavit of LBH himself.